

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

Docket
No. 75-4204

IN THE
United States Court of Appeals
For the Second Circuit

OLIN CONSTRUCTION COMPANY, INC.,

Petitioner,

— vs —

OCCUPATIONAL SAFETY AND HEALTH REVIEW
COMMISSION and SECRETARY OF LABOR.

Respondents.

BRIEF FOR PETITIONER,
Olin Construction Company, Inc.

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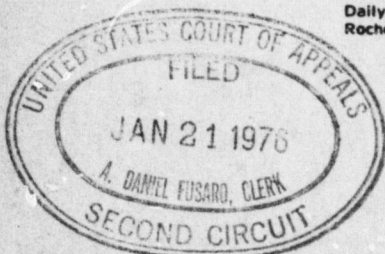




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**IN THE
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For the Second Circuit**

OLIN CONSTRUCTION COMPANY, INC.,

Petitioner,

-vs-

C. A. No. 75-4204

OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION and SECRETARY
OF LABOR,

Respondents.

**BRIEF FOR PETITIONER,
Olin Construction Company, Inc.**

STATEMENT OF ISSUES PRESENTED:

1. Is reversible error committed where the findings of the Commission and its Administrative Judge, in favor of the Secretary, are based upon a standard of "substantial evidence" (instead of a "preponderance of the evidence") as the quantum of proof the Secretary must adduce to meet his burden of persuasion?
2. Did the Secretary of Labor sustain his burden of proof?
3. Were the findings of the Commission and its Administrative Judge, in favor of the Secretary, supported by "substantial evidence?"
4. Were the penalties imposed by the Commission proper and just?

PRELIMINARY STATEMENT

The within proceeding is a petition (Ap. 1 - 4) by Olin Construction Company, Inc. (referred to herein as "Employer") to review a final order of the Occupational Safety and Health Review Commission (referred to herein as "Commission") issued in the matter entitled "Secretary of Labor, Complainant, (referred to herein as "Secretary") vs. Olin Construction Company, Inc., Respondent, OSAHRC Docket No. 3486" pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U. S. C. 651 et seq. (referred to herein as "the Act").

The memorandum decision of the Commission, dated July 23, 1975, affirmed by an equally divided Commission (due to a vacancy of one Commissioner) the decision of Review Commission Judge David H. Harris dated March 29, 1974. The decisions of the Commission and the Review Commission Judge are set forth in the appendix herein (Ap. 5 - 17). The decision of the Commission and a summary of the Judge's decision is reported at 3 OSHC 1417.

STATEMENT OF CASE

On June 18, 1973, the Secretary, pursuant to Section 9(a) of the Act and as the result of an inspection made by representatives of the Secretary on June 18, 1973, issued to Employer a citation for an alleged serious violation of the Act as set forth in the Standard at 29 C.F.R. 1926.652(a) with a proposed penalty of \$500 for said alleged serious violation (Ap. 18 - 20).

On June 20, 1973, the Secretary also issued a citation for an alleged non-serious violation occurring at the same job site without any proposed penalty. Employer did not contest this non-serious violation and this matter is not part of the within petition (Ap. 11).

On or about June 25, 1973, Employer filed timely notice of contest to the alleged serious violation and the proposed penalty of \$500 (Ap. 21).

On or about July 16, 1973, the Secretary filed a complaint with the Commission seeking affirmation of the citation for the alleged serious violation and proposed penalty therefor which Employer had contested (Ap. 24 - 29).

On or about July 23, 1973, Employer filed its Answer to said complaint seeking dismissal of the alleged violation and proposed penalty (Ap. 30 - 32).

On September 25, 1973, a hearing was held at Poughkeepsie, New York before Review Commission Judge David H. Harris (Ap. 33).

By decision and order dated March 29, 1974, Review Commission Judge Harris allowed the complaint to be amended by deleting reference in the complaint to the standard at 29 C.F.R. 1926.652(a) and substituting therefor reference to the standard at 29 C.F.R. 1926.652(b); adjudged Employer to be in violation of the standard at 29 C.F.R. 1926.652(b); affirmed the citation of June 18, 1973, as amended; and issued a penalty of \$500 against Employer for violation of said standard (Ap. 16, 17).

On or about April 26, 1974, Hon. Robert D. Moran, Chairman of

the Commission, exercised his authority under 29 U.S.C. 661(i) and directed a review of the decision of Review Commission Judge Harris (Ap. 6). By memorandum Decision dated July 23, 1975, an equally divided Commission affirmed the decision of Judge Harris (Ap. 6, 7).

This case is before the Court pursuant to Section 11(a) of the Act on Employer's petition to review the Commission's final order of July 23, 1975. The Court has jurisdiction under 29 U.S.C. 660(a), the alleged violation having occurred near Poughkeepsie, New York (Ap. 9).

STATEMENT OF FACTS

1. Employer is a New York corporation with principal offices in Camillus, Onondaga County, New York (Tr. 6, 7) (Ap. 38, 39).
2. In June, 1973, Employer was engaged in constructing a main water line on the north side of Route 55, Town of Poughkeepsie, New York (Tr. 3, 69)(Ap. 35, 101).
3. On June 18, 1973, a work crew of Employer was digging a test hole to locate an electric cable and conduit which crossed the line of main trench (Tr. 44, 71, 72, 76, 110)(Ap. 76, 103, 104, 108, 142).
4. The approximate point at which the electric cable crossed the main line had been designated by a paint mark placed on the pavement of Route 55 by the Central Hudson Power Co. (Tr. 73, 100)(Ap. 105, 132).
5. The depth of the electric cable and/or conduit was not known (Tr. 72, 73)(Ap. 104, 105).
6. On June 18, 1973, enforcement officer Scott (Secretary's

Representative) while driving easterly on Route 55, Town of Poughkeepsie, New York, noticed some construction equipment and an open trench on the north side of Route 55 (Tr. 12) (Ap. 44).

7. Scott had no experience in inspecting trenching sites prior to his becoming an enforcement officer; had examined only 20 sites during his two years of employment with OSHA and had no experience or training in soil evaluation (Tr. 24, 25) (Ap. 56, 57).

8. As Scott approached the work site, he observed three men at grade level above the trench and two men in the trench (Tr. 12) (Ap. 44).

9. The heads and shoulders of the two men in the trench were visible to Scott as he approached the work site (Dec. p. 5, Tr. 12) (Ap. 15, 44).

10. After parking his car on the south side of Route 55, Scott walked over to the work site (Tr. 12) (Ap. 44).

11. When Scott arrived at the work site, no one was in the trench (Tr. 12) (Ap. 44).

12. The trench was on the north side of Route 55 and ran generally in an east to west direction (Tr. 3, 50, 51) (Ap. 35, 82, 83).

13. The trench was estimated to be approximately 3 feet wide at the bottom, 5 to 8 feet wide at the top, 15 feet long at the bottom and 20 to 25 feet long at the top (Tr. 30, 77, 82, 83) (Ap. 62, 109, 114, 115).

14. Scott did not make any measurement of the width or length of the trench (Tr. 31, 32, 39) (Ap. 63, 64, 71).

15. The only measurement made by Scott was an "eyeball" approximation of the depth of the trench (Tr. 39)(Ap. 71).

16. When Scott made his "eyeball" approximation of the depth of the trench, his eye was not at ground level and he could not see the bottom of the trench (Tr. 15, 39, 40)(Ap. 47, 71, 72).

17. When Scott handed the citation to Employer's foreman Schreppel, Scott stated that the measurement of the cut (depth) of the trench was approximate and "nobody took an accurate reading on that trench" (Tr. 50)(Ap. 82).

18. The point at which the rule had been placed to make the measurement of the trench depth was a "little hole where the ruler went into the side of the conduit" (Tr. 140)(Ap. 172).

19. The trench had a four foot constant depth in the area where Scott had observed the heads and shoulders of the two employees working in the trench (Tr. 12, 14, 140)(Ap. 44, 46, 172).

20. Scott testified that at the time of the inspection, he could see the top of the northeast corner of the conduit which had been exposed (Tr. 133, 134)(Ap. 165, 166).

21. When the conduit was exposed the day following the inspection, the top of the conduit was found to be 4 1/2 feet below the road level (Tr. 84, 85, 86; Exs. R-1, R-2)(Ap. 116, 117, 118, 137).

POINT I. THE FINDINGS, DECISION AND ORDER OF
THE REVIEW COMMISSION JUDGE (AFFIRMED
BY AN EQUALLY DIVIDED COMMISSION) WERE
BASED ON THE WRONG STANDARD OF PROOF.

Review Commission Judge Harris sets forth in his decision (Ap. 11) the standard of proof he required of the Secretary in making his determination of the issues involved in the within proceeding as follows:

"The substantial evidence, on the record
considered as a whole, supports the following
findings of fact and conclusions of law"
(emphasis ours).

Clearly, Judge Harris erroneously used the wrong standard of proof as the basis for his determination in favor of the Secretary (National Realty and Construction Company, Inc. v. OSAHRC, 1973, CA DC, 489 F2d 1257, 10SHC 1422).

This Court (in a case involving the same parties as the within appeal) recently held that the ".... preponderance of evidence rule, which we emphasize must be strictly adhered to by Administrative Judges." is the proper rule to be applied, and not the "substantial evidence" test as used by the Review Commission Judge (Olin Construction Company, Incorporated v. OSAHRC and Secretary of Labor, September, 1975, 3 OSHC 1526, 1628).

While this Court held that on the record in the previous case, the failure to apply the "preponderance" rather than the "substantial" evidence test was harmless error (Olin v. OSAHRC and Secretary of Labor,

supra, at pages 1527 and 1528, Employer submits that the present record cannot support the same conclusion.

While this brief writer does not agree with the conclusion of this Court in the previous case, there is more substantial support for Employer's position that reversible error has been committed.

OSAHRC Chairman Moran in the present matter found that "the inspector's approximation from an 'eyeball' observation of a 72 inch marker is insufficient to establish that the depth of the respondent's (employer's) trench was five feet or more" (Ap. 6, 3 OSHC 1418).

The Commission itself has indicated that "eyeball" estimates are not acceptable as proof of depth (cf. Secretary of Labor v. Dedona Contracting Corporation, 3 OSHC 1580, 1581).

Employer submits that the record shows that by using the wrong standard of proof, substantial, reversible error has been committed and the decision and order herein must be reversed.

POINT II. THE SECRETARY OF LABOR FAILED TO SUSTAIN HIS BURDEN OF PROOF.

While Employer submits that the argument set forth in Point I (supra) establishes reversible error, Employer urges, without waiver of its Point I position, that in fact the Secretary failed to prove a violation of the standard involved by any standard of proof.

The standard at 29 C.F.R. 1926.652(b) provides that:

"Sides of trenches in unstable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them. See Tables P-1, P-2 (following paragraph (g) of this section)."

A. THE "EYEBALL" MEASUREMENT

Enforcement Officer Scott (the Secretary's only witness as to the alleged violation) testified that no accurate measurement of the trench depth was made (Ap. 12, 71); the measurements were approximate (Ap. 82).

Judge Harris described the means by which Scott made the measurement as follows (Ap. 12):

"He assumed a squatting position and looking at the rule held by Seelman, with his eyes a few inches above ground level (Tr. 38 - 40), observed the 72" inch mark on the rule to be an inch or two above grade level (Tr. 15).

Clearly, this was only an "eyeball" approximation of the depth of the trench which Commission Chairman Moran found was insufficient to establish that the depth of the trench was five feet or more (Ap. 6).

Judge Harris sought to corroborate the testimony of Scott by drawing an inference from an assumed failure of the Employer to call as witnesses, employees present at the time of inspection (Ap. 14).

Employer submits, first, that the record shows that the names and addresses of all such employees were known to the Secretary and available to testify in his favor to support his required burden of proof.

Secondly, Judge Harris has misunderstood the nature of the inference in such circumstances.

The Court in Laffin v. Ryan, 4 A.D. 2d 21, 162 N.Y.S. 2d 730 (cited by Judge Harris - Ap. 14), at page 26 states:

"But the nature of the inference must be properly understood. The inference cannot take the place of evidence; it cannot supply a deficiency in the other party's case nor can it be regarded as proof of any essential fact (Kezer v. Dwelle-Kaiser Co., 222 App. Div. 350, 356). As has been said, the effect of the failure to call the witness is "persuasive rather than probative(Stocker v. Boston & Maine R. R. Co., 84 N.H. 377, Ann. 70 A.L.R. 1320, 1326; see, also, People v. Ashley, 42 Cal. 2d; Kimball v. O'Dell & Eddy Co., 138 App. Div. 409; Eldridge v. Terry & Trench Co., 145 App. Div. 560."

The reliance of the Administrative Judge upon such an inference to supply a weakness in the Secretary's proof (see Sec. of Labor v. Dedona Contracting Corporation, Docket No. 7635, 3 OSHC 1580) was error particularly in view of the inconsistencies in Scott's testimony as to the depth of the trench.

B. SCOTT'S INCONSISTENT TESTIMONY

On recross examination, Scott testified that the "eyeball" measurement was made by placing the end of the ruler at the deepest part of the trench, in a probe hole alongside of the conduit (Ap. 140, 141). The bottom of the trench at the point where the men were and where the measurement had been made was level for about four feet and then began to slope upward. Scott determined by an "eyeball" measurement that the depth of the trench at this point was approximately 72 inches (Ap. 71).

Scott's testimony, accepted by Judge Harris (Ap. 15) was that

when he observed the men in the trench he could see the "tops of their heads and shoulders" (Ap. 45).

Employer submits that the finding (Ap. 12) of these two facts by the Administrative Judge, viz:

1. the depth of the trench where the two employees were observed was approximately 72 inches; and
2. the heads and the shoulders of the two men in the trench were visible,

are so inconsistent that the approximate "eyeball" observation of the depth of the trench cannot be accepted as proof that the trench was more than five feet in depth.

It is apparent that if the trench depth was 72 inches at the shoulder height of the men, the employees had to be approximately seven feet in height; or the trench was not 72 inches in depth.

Upon the testimony as a whole, the finding of Chairman Moran that the "eyeball" approximation of the depth of the trench was "insufficient to establish that the depth of the respondent's (employer's) trench was five feet or more" should be sustained and the complaint against the employer dismissed.

POINT III. THE PENALTY IS UNJUST

The Administrative Law Judge assessed a penalty of \$500 for the violation involved (Ap. 17). The judge admitted that the exposure involved was minimal (Ap. 15) and perhaps no penalty would have been imposed

except an incident occurring four days earlier involving an inspection by the New York State Department of Labor (Ap. 16).

A reading of the testimony of New York State Inspector Tompkins (Ap. 85 - 97) clearly shows that the two situations were not comparable. Tompkins observed a trenching operation where pipe was being installed (Tr. 93) and not an operation probing for a conduit (Tr. 76) where the head and shoulders of employees' in the trench were visible (Ap. 45).

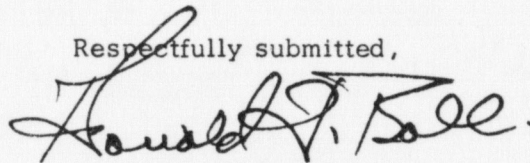
Further, there is no evidence that the State regulation which Tompkins determined to be violated is the same as the standard at 29 CFR 1926.652(b) which is the subject matter of this proceeding.

POINT IV. CONCLUSION

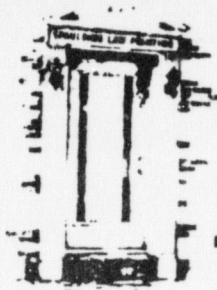
Employer respectfully requests that this Court grant an order setting aside and vacating the decision of the Commission affirming the decision of the Administrative Law Judge and directing and dismissing the complaint of the Secretary and the citation and penalty set forth therein; and

For such other relief as this Court may deem just and meet.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Donald J. Ball", is written over the typed name.

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Re: Olin Construction Co., Inc. v. Occupational Safety and Health Review
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Index No. --

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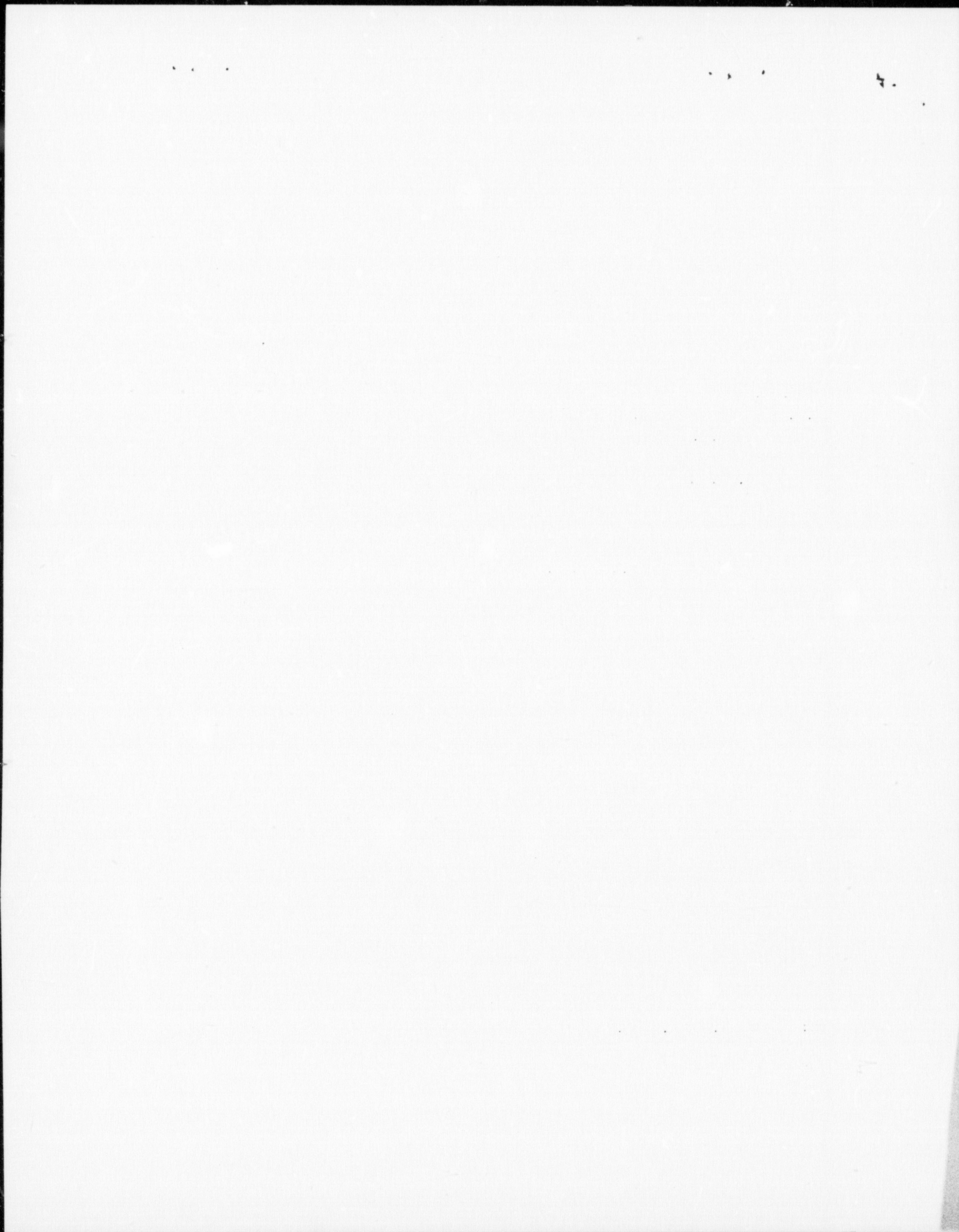
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.....
Notary Public
Commissioner of Deeds

cc: **Donald J. Ball, Esq.**